



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 26, 1995

Mr. H. Chuck Bauman
Assistant District Attorney
Smith County Courthouse
100 N. Broadway, Suite 304
Tyler, Texas 75702

OR95-488

Dear Mr. Bauman:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 32118.

Smith County (the "county") received an open records request for (1) documents, communications, memorandum, tape recordings, and any other statements related to the murder of Keith Wills and the prosecution of Andrew Lee Mitchell for the offense; (2) documents, if any, reflecting various policies of the county sheriff's office which were in effect from 1979 through 1982; and (3) any documents that reflect the sheriff's personal involvement in the Wills murder investigation or which reflect his mental impressions about the investigation.

You inform us that Mitchell was tried and convicted of capital murder of Wills. You inform us that Mitchell's conviction for capital murder was overturned in 1993. You state that currently the district attorney is reinvestigating Wills' murder and is preparing for a second prosecution of Mitchell for capital murder. You state that the sheriff's department and the Texas Rangers are in the process of locating witnesses to Wills' murder. You inform us that the case has not been set for trial. You state that the records requested relate to the investigation and prosecution of Mitchell for capital murder. You state that the release of the requested information "would unduly interfere with the law enforcement and prosecution of this extremely important capital murder case." You state that disclosure of the requested records might subject witnesses to possible intimidation or it might harm the prospects of future cooperation between them and law enforcement if they know their identity and the information they provide cannot be kept confidential.

Additionally, you inform us that Mitchell has filed a federal civil lawsuit against the county, the sheriff, and two former sheriff's department employees for damages. You have submitted for our review a copy of the complaint Mitchell filed in the federal civil lawsuit. You argue that since none of the defendants has filed an answer to Mitchell's complaint, that to release the records requested pursuant to the act would circumvent the rules of discovery applicable to the civil litigation. You contend that the records requested are excepted from required disclosure by sections 552.103(a) and 552.108 of the Government Code. You have submitted for our review copies of the responsive records. We assume that the records submitted are responsive to both the civil and the criminal cases.

Regarding the request for copies of policies and any documents reflecting the sheriff's involvement or mental impressions of the case, by letter to the requestor, a copy of which you submit for our review, you state that "no documents exist that are responsive to the requests." The act does not require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed w.o.j.); Attorney General Opinion H-90 (1973); Open Records Decision No. 605 (1992). Accordingly, the county need not prepare documents that were not in existence at the time the request was made. Having determined that you need not prepare records for the request which you state do not exist, we address your contentions that sections 552.103(a) and 552.108 apply to except from required disclosure the remainder of the records requested that relate to Mitchell's criminal and civil cases.

Section 552.103(a) applies to information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ refused n.r.e.); Open Records Decision No. 588 (1991). In this instance, you have made the requisite showing that the records submitted relate to pending litigation for purposes of section 552.103(a).

A review of the records before us indicates that some of the information provided is public. Included in the records submitted for our review is an autopsy report. Section 11 of article 49.25 of the Code of Criminal Procedure expressly provides that autopsy reports are public records. Therefore, you must disclose the autopsy report to the requestor. In addition, if the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information such as that listed in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975, writ *ref'd per curiam*, 536 S.W.2d 559 (Tex. 1976), and catalogued in Open Records Decision No. 127 (1976), may not be withheld under section 552.103(a) since the opposing party in this case has seen the information. See Open Records Decision No. 597 (1991) at 3. In addition, the applicability of section 552.103(a) ends once the litigation is concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). The remainder of the information you may withhold pursuant to section 552.103(a) of the Government Code.¹ To determine what information must be released, you will need to examine the content of information rather than its location in the related documents. It is the content of information rather than the location in documents which determines whether information must be released under *Houston Chronicle Publishing Co.* See Open Records Decision No. 127 (1976) at 5.

Additionally, the information on the offense report is not protected from required disclosure by section 552.108 of the Government Code. See *Houston Chronicle Publishing Co.*, 684 S.W.2d at 212; Open Records Decision No. 127 (1976). Because we have determined that the remaining information is protected by section 552.103(a), we need not address your section 552.108 argument.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kathryn P. Baffes
Assistant Attorney General
Open Government Section

¹In so ruling, we assume that any of the information not of the kind which is held to be public under *Houston Chronicle Publishing Co.* does not appear in court records. See *Star Telegram v. Walker*, 836 S.W.2d 54 (Tex. 1992) (no privacy interest in information found in public court documents).

KPB/KHG/rho

Ref: ID# 32118

Enclosures: Submitted documents

cc: Mr. Trek Doyle
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(w/o enclosures)